KHOR LYE HOCK & ANOR A

v.

MAKASSAR ENGINEERING & CONSTRUCTION SDN BHD & ORS B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[SUIT NO: D-26-33-2009]
8 JANUARY 2010 C

CIVIL PROCEDURE: *Striking out - Pleadings - Petition under s. 181 Companies Act 1965 - Application to strike out prayers (a) to (f) in petition - Petitioner was the managing director and shareholder of first respondent - Whether oppressive act affected first petitioner in his capacity as a member - Whether relief available - Whether s. 181(2) to be read in conjunction with s. 181(1) Companies Act 1965 - Whether conditions satisfied - Rules of the High Court 1980, O. 18 r. 19(1)* D

COMPANY LAW: *Members' rights - Oppression - Mismanagement - Petition under s. 181 Companies Act 1965 - Whether oppressive act affected first petitioner in his capacity as a member - Whether relief available - Whether s. 181(2) to be read in conjunction with s. 181(1) Companies Act 1965 - Whether conditions satisfied* E

COMPANY LAW: *Oppression - Relief - Petition under s. 181 Companies Act 1965 - Whether oppressive act affected first petitioner in his capacity as a member - Whether relief available - Whether s. 181(2) to be read in conjunction with s. 181(1) Companies Act 1965 - Whether conditions satisfied* F

This was an application by the respondents under O. 18 r. 19(1)(a) to (d) of the Rules of the High Court 1980 to strike out prayers (a) to (f) in the oppression petition filed by the petitioners which was premised on the reliefs available under s. 181 of the Companies Act 1965 ('the Act'). The first petitioner ('P1') was the managing director and shareholder of the first respondent company ('R1'). The prayers sought to be struck out in the said petition were in relation to prayer (a) for an order to cancel or revoke the resolution dated 25 May 2005 whereby P1 was removed as the managing director of R1, prayer (b)(i) for an order to cancel the act of the fifth respondent ('R5') in taking over a project in Putrajaya while prayer b(ii) for an order to direct R5 G H I

A to return the said project to R1, prayer (c) for an order to prohibit the second respondent ('R2') from carrying out his functions as the current managing director of R1, prayer (d) seeking damages, jointly or severally from R2, the third respondent ('R3'), the fourth respondent ('R4') and R5, prayer (e) seeking that the affairs of R1 B be conducted by a receiver and manager and (f) for a detailed examination to be undertaken in respect of R5's accounts to ascertain the profits from the said project in Putrajaya.

C **Held (allowing the respondents application to strike out prayers (a), (b)(i) & (ii), (c) and (e); prayer (d) to be amended; refusing the application to strike out prayer (f); costs in the cause):**

D **(1)** It is a principle of law relating to the grant of relief under s. 181 of the Act that mismanagement in itself is not actionable. The oppressing acts complained of must have affected P1's capacity as a member in order to seek relief under s. 181(2) of the Act which was to be read in conjunction with s. 181(1)(a) or (b) of the Act. (paras 9-10 & 15)

E

(2) Prayer (a) did not relate to P1's rights as a member but merely to his executive position as a managing director. Moreover, the board of directors were empowered to remove P1 under art. 91 of Table A. It was significant that he had F not been removed as a director nor his shareholding adversely affected. Prayer (c) was also related to prayer (a) and accordingly both these prayers should be struck out. (para 12)

(3) Prayer (b)(i) and (ii) were related to a civil dispute between G R1 and R5. The losses and damages, if any, were related to R1 rather than to P1. Pursuant to the rule in *Foss v. Harbottle*, the proper plaintiff would have been R1. Besides, P1 had not shown that the respondents had oppressed him in his capacity as a member to warrant a relief under s. 181(2) of the Act. H This prayer should also be struck out since it was not well founded and without merit. (paras 13-14)

(4) Prayer (d) had to be amended to reflect that the loss and damages claimed relates back to a diminution in share value *vis a vis* P1. Rather than striking out, P1 had to amend this I prayer accordingly so as to provide a basis and nexus to justify the damages sought. (paras 16)

(5) In relation to prayer (e), it was not clear whether the oppression suffered by P1 was in his capacity as a shareholder. Besides, this prayer was not consistent with the appointment of a liquidator and the general reliefs which was available under s. 181 of the Act. It was open to P1 to seek such relief on an interlocutory basis should the need arise, for instance if it was shown that the assets of R1 were in jeopardy. There was nothing to indicate such situation here. As such, this prayer should be struck out. (paras 17 & 8)

(6) It was not clear whether the relief sought in prayer (f) affected P1's capacity as a shareholder. Thus, it was not plain and obvious that the prayer should have been struck off. If P1's capacity as a shareholder was affected, then he would have been entitled to such relief under s. 181(2) of the Act. Accordingly, this prayer should not be struck out. (paras 19)

Case(s) referred to:
In re Lundie Brothers Ltd [1965] 1 WLR 1051 ***(refd)***
In The Matter Of Tahansan Sdn Bhd [1984] 1 LNS 1 HC ***(refd)***
In The Matter Of Tong Eng Sdn Bhd [1994] 2 CLJ 775 HC ***(refd)***
Re Chi Liung & Son Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors [1967] 1 LNS 145 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181(1)(a), (b), (2)(a), (b)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)

For the petitioners - TH Tan; M/s TS Teoh & Partners
For the 1st respondent - KS Lim; M/s KS Lim & Ong
For the 2nd, 3rd & 4th respondents - Justin Voon (JH Tan with him); M/s Jublin Tan & Tay

Reported by Kumitha Abdul Majid

JUDGMENT

Nallini Pathmanathan J:

[1] Enclosure 28 is an application by the 2nd, 3rd and 4th respondents (R2, R3 and R4) to strike out prayers (a) to (f) in the oppression petition filed by the petitioner dated 8 June 2009. Enclosure 29 is a similar application to strike out by the 1st respondent (R1). The submissions made in respect of encl. 28

were therefore adopted *in toto* by R1. The submissions in reply by the petitioner were equally applicable to the two applications. The two applications can therefore be dealt with simultaneously. The applications in encls. 28 and 29 are made under O. 18 r. 19(1)(a) to (d) and therefore envisage the consideration of affidavit evidence. They are not restricted to the pleadings alone.

The Prayers Sought To Be Struck Out

[2] Prayer (a) is for an order cancelling or revoking the resolution dated 25 May 2009 whereby the first petitioner (P1) was removed as the Managing Director of R1;

[3] Prayer (b)(i) is for an order cancelling the act of R5 in taking over a project in Precinct 18, Putrajaya from R1, while prayer (b)(ii) is for an order directing R5 to return the said project to R1;

[4] Prayer (c) is an order prohibiting R2 from carrying out his functions as the current Managing Director of R1;

[5] Prayer (d) is a prayer seeking damages, jointly or severally from R2, R3, R4 and R5;

[6] Prayer (e) is a prayer seeking that the affairs of R1 be conducted by a Receiver and Manager appointed by the court;

[7] Prayer (f) is for a detailed examination to be undertaken in respect of the accounts of R5 to ascertain the profits from the said Precinct 18, Putrajaya project from 25 May 2009 and for profits therefrom to be paid out to the petitioner in accordance with the shareholding of the petitioner in R1.

The Law

[8] The petition is based on s. 181 of the Companies Act 1965 ('the Act') and accordingly the remedies and reliefs sought should fall within the ambit of reliefs proscribed by that section. The section provides, *inter alia*, that any member may apply to court on the ground that: (a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members of the company or in disregard of his or their interests as members of the company, or (b) that some act of the company has been done that unfairly discriminates against or is otherwise prejudicial to one or

more of the members of the company. The relief that the court is empowered to grant is set out in subsection (2) which provides that where the court is of the opinion that either of the grounds in subsection (1) has been made out, the court may then make such order as it thinks fit and may do any of the matters set out in subsection (2) of the Act.

[9] It follows that subsection (2) is to be read in conjunction with subsection (1) as it is only in the event that the grounds in para (a) or (b) of subsection 1 are made out that the court may go on to provide the relief set out in para 2.

[10] It is a principle of the law relating to the grant of relief under s. 181 that mismanagement in itself is not actionable. Disputes relating to policy or management do not entitle a member to relief under the section. More significantly the oppression in question must affect the petitioning member *qua* member. The acts complained of must affect the member in his capacity as a member, (see *Re Chi Liung & Son Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors* [1967] 1 LNS 145 and *In The Matter Of Tong Eng Sdn Bhd* [1994] 2 CLJ 775 per Selventhiranathan J. Prayer (a): This prayer relates to the removal of P1 as a Managing Director. It seeks to cancel the resolution dated 15 May 2009 that removed P1 as Managing Director. The complaint here and relief sought relates to P1's contractual position as Managing Director. It does not relate to his rights as a member. The Board of Directors, moreover is empowered under art. 91 of Table A to remove P1. It is significant that he has not been removed as a director nor has any attempt been made to adversely affect his shareholding. In the matter of *In The Matter Of Tahansan Sdn Bhd* [1984] 1 LNS 1, Chan J quoted Plowman J in *Re Lundie Brothers Ltd* [1965] 1 WLR 1051:

> ... In my judgment he has wholly failed to do that. His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That, it seems to me, has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and not to his status as a shareholder of the company.

Chan J then went on to hold:

> The fact that the petitioner in the present case was ousted as a director and that he was deprived of his directors' remuneration relates only to his status as a director, and not to his status as a shareholder. The court, therefore is not given jurisdiction in a situation like this to make an order under section 181.

[11] In response to this attack, learned counsel for the petitioner, P1 maintains that the entire 'oppression' that he complains of started with the removal of P1 as the Managing Director. When he was removed as the managing director, the projects were accordingly moved or transferred from R1 to R5. That, it is submitted is why prayer (a) is sought. P1 further maintains that the prayer falls within the ambit of s. 181(2) which provides: "If on such application the court is of the opinion that either of those grounds is established the court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may – (a) **direct or prohibit any act or cancel or vary any transaction or resolution**; (b) regulate the conduct of the affairs of the company in future; (c) provide for the purchase of the shares or debentures of the company ... etc. (emphasis added).

[12] It appears that the court may, under s. 181(2)(a) cancel a resolution. However it is implicit that s. 181(2) envisages that the court conclude that one of the grounds in s. 181(1)(a) or (b) has been satisfied/fulfilled, prior to granting relief under s. 181(2). Section 181(1)(a) or (b) however envisages oppression of the petitioner in his capacity as a member as outlined earlier. The current complaint in prayer (a) does not extend to P1 in his capacity as a member but merely relates to his executive position as Managing Director. P1 moreover remains a director of R1. In these circumstances it cannot be said that P1 is injured or oppressed in his capacity as a member and accordingly the relief sought in prayer (a) is not available to be granted to him under s. 181(2). Accordingly this prayer is struck out.

[13] Prayer (b)(i) and (ii) relate to orders seeking to return the project known as Precinct 18, Putrajaya to R1 from R5. (b)(i) seeks to cancel the act of R5 in taking over the project from R1 while (b)(ii) orders R5 to return the project to R1. Learned counsel for the respondents maintains that this prayer relates in

reality to a civil dispute between R1 and R5. The loss and damage, if any, complained of relate to R1, rather than to P1. Accordingly the proper plaintiff is the company R1 itself pursuant to the rule in *Foss v. Harbottle*. The respondents also point to the fact that P1 is on the one hand asking for the company R1 to be wound up and on the other hand, seeking to have this particular construction contract re-awarded to it. It is submitted that the interests of house purchasers who have invested in this project would be adversely affected if indeed such a prayer were granted and R1 subsequently wound up.

[14] Learned counsel for P1 in response to this maintains that this prayer, like prayer (a) falls within the ambit of s. 181(2)(a), which is sufficiently wide to enable the court to grant such relief. However once again the issue that falls for consideration is whether, on the face of the petition, P1 has shown oppression in the conduct of the respondents to him in his capacity as a member warranting the relief circumscribed in s. 181(2). It does not appear that P1 has shown this. Additionally, the injury or loss if at all, appears to be that of R1. Accordingly the proper plaintiff would be the company, R1. In these circumstances it does not appear that this prayer is well-founded and is also struck out. In so deciding I am mindful of the fact that such prayers should only be struck out on the basis that it is clear and obvious that it has no merit, without a meticulous examination of the affidavits. That indeed is the case here.

[15] Turning to prayer (c), this again relates to a prayer seeking to restrain R2 from carrying out his duties as the Managing Director of R1. This prayer relates to prayer (a). Applying the same reasoning as has been adopted above, it follows that P1 has not shown that he has been oppressed in his capacity as a shareholder warranting intervention and the relief sought in prayer (c). Accordingly this prayer is also struck out.

[16] With respect to prayer (d), the respondents contend that the prayer simply seeks damages without laying down any basis for the same. They do however concede that the prayer can be sustained if it is amended to reflect that the loss and damage claimed relates back to a diminution in share value *vis-a-vis* P1. Accordingly, rather than strike out this prayer, it is ordered that P1 do amend the prayer accordingly, to provide a basis and nexus to the petition to justify the damages sought.

[17] As for prayer (e), this relates to the appointment of a Receiver and Manager. Learned counsel for P1 maintains that it can be granted under s. 181(2)(b). Again this comes back to the question of the oppression suffered by P1 in his capacity as a shareholder. This is not clear. I also agree with learned counsel for the respondents that this prayer is not consistent with that of the appointment of a liquidator and the general reliefs available on a s. 181 petition. It is moreover open to P1 to seek such relief on an interlocutory basis should the need arise, for instance if it is shown that the assets of R1 are in jeopardy. There is nothing to indicate such a situation here, presently. This prayer is also struck out.

[18] Finally with regards to prayer (f) which seeks an account to be taken in respect of the project known as Precinct 18, Putrajaya and that all profits from that project be distributed to the shareholders of R1 in accordance with their shareholding, the respondents contend that this is related to prayer (b) and that it should be struck out. Learned counsel for P1 maintains that this comes under s. 181(2)(a), namely to direct any act or transaction. He further submits that if prayers (b) and (f) which relate to R5 are struck out, there would be no relief available *vis-a-vis* R5. Additionally, an attempt to strike out the entire claim against R5 was struck out. By seeking to strike out this prayer, it is contended that the respondents are taking a second 'bite at the cherry' so to speak.

[19] It is not clear to this court whether the relief sought under prayer (f) relates or affects P1 in his capacity as a shareholder. As such it is not plain and obvious to this court that the prayer should be struck out. If indeed it does affect P1 in his capacity as a shareholder, then he would be entitled to such relief under s. 181(2). Accordingly this prayer is not struck out.

[20] In summary therefore, for encls. 28 and 29, the respondents are granted an OIT of their application to strike out prayers (a), (b)(i) and (ii), (c) and (e) of encl. 1. Prayer (d) is to be amended as set out above and the application to strike out prayer (f) is refused. Costs in the cause.